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INTRODUCTION

Marriage is a universal institution which is recognized and respected all over the world. As a social institution, marriage is founded on and governed by the social and religious norms of the society. Consequently, the sanctity of marriage is a well accepted principle in the world community².

Marriage could either be monogamous or polygamous in nature. A monogamous marriage has been described as '...the voluntary union for life of one man and one woman to the exclusion of all others'³. A polygamous marriage on the other hand can be defined as a voluntary union for life of one man with one or several wives. The plurality of wives does not affect the character of the marriage⁴.

This paper will consider the legal requirements to validate a customary law marriage as applicable in Nigeria and compare with the legal requirements to validate an Islamic marriage.

REQUIREMENTS OF A VALID ISLAMIC LAW MARRIAGE

In Islam, marriage is a social and legal relationship intended to strengthen and extend family relationships. Islamic marriage begins with a search for an appropriate partner, and ends with an agreement of marriage, the contract, and the wedding ceremony.

The laws that govern an Islamic marriage are the Qur'an and Hadith⁵. Islam recognizes value of sex and advocates marriage. Islam does not believe in celibacy. Allah has commanded the Muslims to marry for the Qur'an says:

"And marry those among you who are single...."⁶

¹ Olanike Sekinat Adelakun LL.M, BL

² E.I. Nwogugu: Family law in Nigeria, 3rd ed., pg lxxviii

³ Hyde v. Hyde (1886) LR1 P & D 130 at 133

⁴ E.I. Nwogugu, op cit

⁵ Teachings of the Prophet (PBUH)

In Islam, marriage is essentially a contract. However, the distinction between sacred and secular was never explicit in Islam. Any action or transaction in Islam has religious implications. It is not quite accurate, therefore, to designate marriage in Islam simply as a secular contract. The appropriate designation of marriage could be a "Divine Institution".

The general purpose of marriage is that the sexes can provide company to one another, love to one another, procreate children and live in peace and tranquility to the commandments of Allah.

For a valid Islamic marriage, the following conditions must be satisfied:

- a. There must be a clear proposal.
- b. There must be a clear acceptance.
- c. There must be at least two competent witnesses.
- d. There must be a marriage gift, little or more, by the bridegroom to the bride.

A. PROPOSAL

The choice of a partner should be the one with the most piety. The prophet recommended the suitors see each other before going through with marriage. It is unreasonable for two people to be thrown together and be expected to relate and be intimate when they know nothing of each other. The couples are permitted to look at each other with a critical eye and not a lustful one. This ruling does not contradict the verse of the Holy Qur'an which says that believing men and women should lower their gaze⁷. The Prophet (PBUH) has said, "When one of you asks for a woman in marriage, if he is able to look at what induced him to marry her, he should do so."⁸ However, it is not permitted in Islam for a man to be alone with a woman in the name of selection of spouse.

There is no concept of courtship in Islam as it is practiced in the west. There is no dating or living in *de facto* relationship or trying each other out before they commit to each other seriously. There is to be no physical relationship what so ever before marriage. The romantic notions that young people often have, have

⁶ Q 24:33

⁷ <http://www.jannah.org/sisters/marr.html>

⁸ Narrated in the book of tradition of Abu Daud

proven in most cases to be unrealistic and harmful to those involved. We only have to look at the alarming divorce rate in the west to understand this point. e.g. the couple know each other for years, are intimate, live together and so on yet somehow this does not guarantee the success of the future marriage. Romance and love simply do not guarantee everlasting bond between two people.

Arranged marriages on the other hand, are based not on physical attraction or romantic notions but rather on critical evaluation of the compatibility of the couple. This is why they often prove successful.

B. ACCEPTANCE

It is the girl's right to make decision concerning her marriage and her father or guardian has no right to over-ride her objections or ignore her wishes. The Prophet (PBUH) has said, "A woman who has been previously married has more right concerning her person than her guardian and a virgin's consent must be asked about herself, her consent being her silence."⁹

The choice of a partner by a Muslim virgin girl is subject to the approval of the father or guardian under Maliki School. This is to safeguard her welfare and interests. The prophet said "the widow and the divorced woman shall not be married until she has consented and the virgin shall not be married until her consent is obtained. The prophet did revoke the marriage of a girl who complained to him that her father had married her against her wishes."¹⁰

As far as the consent of guardian is concerned, it can only be dispensed with if the guardian is simply refusing to give consent for considerations other than Islamic, in which case the bride can apply to an Islamic court and the judge can authorize the marriage after having followed the due process. If, on the other hand, such is not the case and no attempt was made to ascertain the consent of the guardian, then such a marriage would be considered void and, therefore, unacceptable in Islam¹¹.

⁹ Narrated in the books of tradition of Bukhari and Muslim

¹⁰ <http://www.jannah.org/sisters/marr.html>

¹¹ Ahmad Kutty : Islamic Ruling on Secret Marriage , retrieved from http://www.zawaj.com/articles/marriage_in_secret.html

C. WITNESSES

This is necessary to exclude illicit sex and to safeguard legitimacy of progeny. It is recommended that marriage should be widely publicized. It should never be kept secret as it leads to suspicion and troubles within the community¹². The requirement is at least two upright Muslim witnesses.

D. GIFT¹³

Dowry or marriage gift by bridegroom to the bride is a symbolic expression of the groom's cognizance of the economic responsibilities of marriage and of his readiness to assume all such responsibilities subsequent to marriage.

The wife is entitled to a marriage gift that is her own. This may be prompt or deferred depending on the agreement between the parties. A marriage is not valid without mahr. It does not have to be money or gold. It can be non-material like teaching her to read the Qur'an. "Mahr" is a gift from the groom to the bride. This is the Islamic law.

Concerning the dowry, Almighty Allah says:

*"And give women (on marriage) their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer"*¹⁴

It went further to say:

*"Those among them (i.e., your wives) whom you enjoy give them their dowers as determined. But there is no blame on you, if after a dower is determined, you mutually agree to vary it"*¹⁵

According to the Shari`ah, the *mahr* should also be reasonable. There is no fixed amount of *mahr* in the Shari`ah. It should be given according to the financial status of the husband and according to the time and place. We cannot apply the *mahr* of the 7th century in the 20th century, nor can the *mahr* of Nigeria or India

¹² <http://www.jannah.org/sisters/marr.html>

¹³ Referred to as 'Mahr' in Islam

¹⁴ An-Nisaa': 4

¹⁵ An-Nisaa': 24

be applied in the United States and Canada. As the financial conditions of the people in different times and places change, so the amount of *mahr* can be determined accordingly. However, it is a principle of the Shari`ah that the *mahr* should not be too expensive. It is wrong to declare a large amount of *mahr* at the time of marriage to show off or to boast.

Sometimes the bride's family puts pressure on the groom and his family for a large amount of *mahr* so that they may show their pride to their relatives and friends, boasting that their daughter was married for a big *mahr*. Sometimes the groom declares a big amount and secretly thinks that this is just a commitment on paper. People are often heard saying, "Write whatever you want, no one asks and no one pays." This is a play with the rules of Allah. Muslims should only commit what they are really capable of paying and what they intend to pay¹⁶.

Once the above conditions have been fulfilled, the marriage will be deemed as valid; but if these conditions are not fulfilled, then it will be considered as being null and void.

REQUIREMENTS OF CUSTOMARY MARRIAGE

Marriage under the customary law may be preceded by betrothal. The basic requirements of a valid customary law marriage are:

1. Capacity
2. Consent
3. Bride price
4. Celebration of marriage

CAPACITY

The parties to a customary law marriage must possess the capacity under that customary law to marry each other.

¹⁶ Living Shari`ah **Ask The Scholar:**

http://www.islamonline.net/servlet/Satellite?cid=1119503549066&pagename=IslamOnline-English-Ask_Scholar%2FFatwaE%2FFatwaEAskTheScholar

Most systems of customary law in Nigeria do not prescribe any age for the solemnization of a customary law marriage. This has however encouraged a high level of child marriage with all its attendant evils¹⁷. However, where a girl under sixteen marries at customary law, the consummation of the marriage does not constitute a sexual offence under the criminal code¹⁸.

In some part of the country, the marriageable age has been fixed by statutes. For instance, the Marriage law of 1956 applicable to the Eastern States fixed the Marriage age at 16. Thus, in those parts, any marriage by or to a person under 16 years is void¹⁹.

CONSENT

Two types of consent are relevant to the celebration of customary law marriage namely consent of parties and parental consent. Where the parties to the marriage are capable of expressing their consent, such consent is expressly demanded and obtained before the marriage²⁰. The importance of consent of parties to a marriage cannot be over emphasized. Even in areas where child marriage occurs, the consent of the parties is still required when they come of age.

The modern trend is for the parties to agree amongst themselves and later communicates the agreement to their parents or guardians who then plan on celebration of the marriage.

In some cases, parental consent is necessary and mandatory for the celebration of customary law marriage. This is justifiable in that customary marriage is a form of contract between two families. The requisite consent is that of the father or guardian who is in loco parentis²¹.

For a girl, parental consent is mandatory. This is to facilitate the payment of bride price and the formal handing over of the bride. An adult male on the other hand may contract a customary law marriage without parental consent.

¹⁷ Nwogugu, op cit

¹⁸ Sections 218 and 221 of the criminal code

¹⁹ Section 3(1)

²⁰ See *Osamawonyi v. Osamawonyi* (1972) 10 SC 1 for an illustration of parties' consent

²¹ Op cit

In some part of the country²², where the parents are adamant, a man or woman acting as the parent may give the child out in marriage²³.

BRIDE PRICE

The payment of bride price is an essential ingredient of a valid customary law marriage. Bride price may be defined as any gift or payment in money, natural produce, brass rods, cowries, or in any other kind of property whatsoever, to a parent or guardian of a female person on account of marriage of that person which is intended or has taken place²⁴.

The quantum of bride price varies from locality to locality and from families to another. The marriage does not depend on full payment of the bride price prior to the marriage. However, at least, there must be part payment before the marriage is concluded²⁵.

The right person entitled to collect the bride price is the father of the girl. In his absence, the right devolves on the male head of his immediate family. Where he is not available, the guardian or person in loco parentis becomes entitled to collect the bride price²⁶.

Where part of the bride price is waived, no serious legal question arises but where the full bride price is waived, it is an impediment to the validity of the marriage²⁷ except where the parties acknowledge the fundamental nature of bride price and pay a token or some gifts are collected as is the practice recently, the condition of bride price will be deemed to have been fulfilled.

Payment of bride price does not constitute a valid marriage at customary law²⁸. It merely creates the status of betrothal and the parties' intention to marry each other.

²² Such as Lagos, Ogun, Oyo, and Ondo States

²³ Section 5 of the Marriage, Divorce and Custody of Children Adoptive By-Laws, 1958

²⁴ Op cit

²⁵ Ibid

²⁶ Ibid

²⁷ Nickaf v. Nickaf Suit No. CA/K/79/84 (unreported) Court of Appeal, Kaduna Division, June 13, 1985

²⁸ Ogunremi v. Ogunremi (1972) 2 UILR 466

CELEBRATION OF MARRIAGE

After the customary law requirements as to capacity, consent and bride price has been fulfilled, the marriage itself has been contracted but in most parts of the country, there is no marriage until the bride has been led to the house of groom or his parents and the formal handing over takes place²⁹.

RESTRICTIONS ON ISLAMIC MARRIAGE

It is permanently prohibited for a Muslim to marry a woman of the following categories:

- a. Father's wife, whether divorced or widowed,
- b. The mother including grand mothers,
- c. The daughter including grand daughter,
- d. The sisters including half and step sisters,
- e. The paternal aunt, whether real, half or step sister of the father,
- f. The maternal aunt, whether real, half or step sister of mother,
- g. The brother's daughter and
- h. The sister's daughter.

The rationale behind this prohibition seems to lie in the fact that there is the need to increase trust among close relations by prohibiting incestuous relations, increase love and affection among close relations, expand family ties beyond close circle etc.

In Islam marriage is also prohibited with foster mother who has suckled him during the period of weaning and with foster sisters, foster aunt and foster nieces.

Islam has also prohibited marriage with mother in law, the stepdaughter, and the daughter in law. Islam has also forbidden having two sisters as co-wives.

It is also prohibited to marry a woman who is a Mushrik³⁰. Allah says the Quran:

"And do not marry Mushrik women until they believe³¹."

²⁹ In the matter of the Marriage Ordinance (Beckely v. Abiodun) (1943) 17 NLR 59

³⁰ Who worships idols or associates other deities with Allah

"It is not permissible for Muslim women to marry non-Muslim men³²."

Islam has allowed man to marry more than one woman but has put serious restrictions on this. It requires agreement of the new wife, his ability to maintain more than one wife, equality among the wives, etc. It is for this reason that few Muslim men marry more than one woman. Islam has allowed this to man to curb illicit sex.

RESTRICTIONS ON CUSTOMARY LAW MARRIAGE

A person who is a party to an existing statutory marriage recognized by law lacks the capacity, during the continuance of such marriage to contract a valid customary law marriage³³.

Likewise, marriage is forbidden between persons who are related by blood, no matter how remote the relationship is. Sometimes, where the blood relationship is quite distant and not directly traceable, inter marriage may be allowed after the performance of sacrifices but this depends on the community. Furthermore, customary law in many parts of Nigeria prohibits the marriage of a man with persons to whom he is related through marriage such as a spouse's sister.

Another prohibition in customary law marriage can be traced to some parts of the Eastern country where some people are categorized as 'osu'³⁴ an such outcastes cannot marry free citizens. This practice has been abolished by statute³⁵ but it still occurs in practice.

THE LEGAL NATURE OF ISLAMIC MARRIAGE IN THE MODERN SOCIETY

It is true that the nikah ceremony can be performed by any Muslim, but in order to organize this serious legal contract, in Muslim countries some people are authorized by the governments to perform the nikah or to register the nikah. These people are called ma'dhun shar`i or qadi, etc. In America, the imams of the Islamic centers or someone authorized by the Islamic centers should officiate the

³¹ Q 2:221

³² Q 60:10

³³ Section 35 of Marriage Act

³⁴ slaves

³⁵ Abolition of the Osu System Law 1956

nikah. Some states in the United States and some provinces of Canada require that the person who performs the marriage must be a justice of the peace, or a judge or a licensed clergy. In some states it is illegal for an unlicensed person to perform marriages.

In the United States and Canada it is also required for the couples who intend to get married to take a license before their marriage. The person who performs the marriage then signs this license along with two witnesses. After that the license is sent to the Registrar of Marriages. The Registrar's office then issues a marriage certificate. No marriage in the US and Canada is recognized as a legal marriage unless it is registered.

Some Muslims do not follow these procedures. They say that in an Islamic marriage, paper work is not necessary. Or they say that they only care for what is halal³⁶ and want to marry according to the Shari`ah; they do not care whether the marriage is legally recognized here or not. However, there are some cases where Muslim women have suffered greatly due to these unregistered marriages. Some Muslim men marry without any legal papers and then they leave their wives. These women do not know what to do and how to get divorce from their husbands who abandon them.

In the US for example, such a woman cannot obtain divorce papers because the local laws, they are not considered married. These women have no proof of their marriage and the courts have no marriage record of these women. If they go to the local Islamic centers in the US, the centers cannot help them because the laws in the country do not give the right of divorce to anyone except to the local superior courts.

To avoid problems like these in non Islamic States, it is important for Muslim men and women to have their marriages and divorces properly documented. Islam teaches fairness and justice in all cases³⁷.

Now coming to the issue of contracting marriages in a society where Islamic laws are not enforced or recognized, it is also highly crucial to get the legal papers

³⁶ Lawful deeds

³⁷ <http://pakistanlink.com/religion.html>

before marriage contract; for legal purposes, the marriage must be solemnized by someone who has been authorized by the law of the land to perform marriage. In the absence of such legalization, there is no guarantee of legal protection for anyone in the event of a dispute. Apart from this, Islam teaches us to do what we do as efficiently, methodically and professionally as we can. The Prophet (PBUH) said:

"Allah loves you to do your work as best as you can"³⁸.

³⁸ Living Shari`ah Fatwa Bank: www.islam.ca